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EXAMINER				
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Please find below and/or attached an Office communication concerning this application or proceeding.

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/540,197
Filing Date: June 20, 2005
Appellant(s): JANKOWSKI ET AL.

Christopher G. Trainor
(Reg. No. 39, 517)
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed May 20, 2009 appealing from the Office action mailed September 11, 2008.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claims 6, 19, 20 and 26 are rejected under 35 U.S.C. 102(b) as being unpatentable over Sauer et al. (USPN 5,839,639).

In reference to claims 6, 19, 20 and 26, Sauer et al. discloses a surgical stapling apparatus and vacuum system comprising: a shell assembly 18 positioned on a distal end and proximal end of a body portion 26; a movable anvil 20; an array of staples 23; an aperture 62; an annular knife (column 7 lines 43-46); a hollow vacuum housing sleeve 12 positioned about a proximal end of the shell assembly 18 to define a vacuum chamber and the distal end of the body 26, wherein the at least one aperture 60 is positioned within the vacuum chamber (figure 2); a vacuum conduit 58 communicating with the vacuum chamber; and at least one vacuum tube 60, 70 having a first end 60 positioned within the vacuum chamber and a second end 70 positioned within an inner chamber of the shell assembly 18.

Claim 7 is rejected under 35 U.S.C. 103(a) as being unpatentable over Sauer et al. (USPN 5,839,639).

Regarding claim 7, Sauer et al. discloses a single vacuum tube 60, but does not disclose any additional vacuum tubes. It would have been obvious to one having ordinary skill in the art at the time of the invention to modify the system of Sauer et al. to include a second vacuum tube, since it has been held that mere duplication of essential working parts of a device involves only routine skill in the art. Furthermore, Appellant's specification does not disclose how an

additional vacuum tube solves a particular problem other than the inherent advantage provided by duplicating essential working parts of a device.

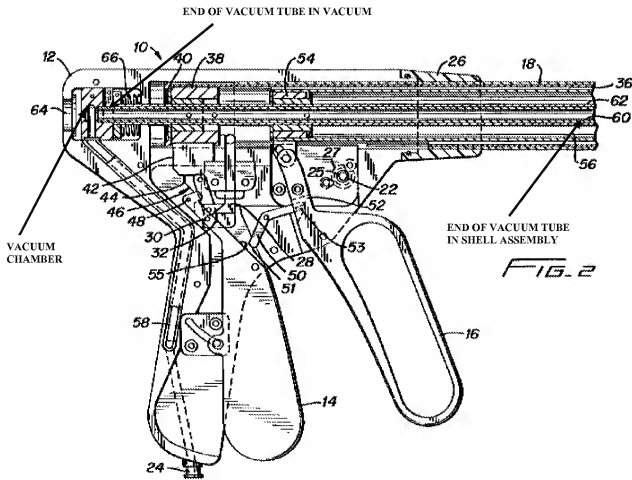
(10) Response to Argument

Examiner maintains the 35 U.S.C. 102(b) rejection of claims 6, 19, 20 and 26 as being anticipated by Sauer et al., as the claimed structural limitations are found to be disclosed by the cited reference.

Appellant has argued that one of ordinary skill would not find Sauer to disclose a vacuum device including a housing as interpreted by Examiner in the rejection provided above. Appellant's invention, as presented in claim 6, comprises a vacuum device including a housing and a vacuum conduit, the housing is positioned about at least a portion of a shell assembly that is positioned about at least a portion of a shell assembly, wherein the shell assembly is positioned on distal end of a body portion *to define* a vacuum chamber. As shown in figure 2 of Sauer, housing 12 supports shell assembly 18 with the assistance of collar 26, such that housing 12 surrounds a portion of the shell assembly 18. The housing is found to meet the limitations of a vacuum chamber since claim 6 structurally defines a vacuum chamber as a housing structure about¹ a portion of the shell assembly. Examiner's assessment of the structure is found to be further supported by the fact that the vacuum chamber of Sauer, as interpreted by Examiner, is in communication with a vacuum conduit 58 and at least one vacuum tube 60, such that a vacuum is transferred through the vacuum conduit (supported within housing) to the vacuum chamber (defined by housing) and subsequently the vacuum tube (supported within housing) for the purpose of allowing a tissue to be suctioned against an end anvil attached to an end of the vacuum tube.

¹ on every side of; around. (<http://dictionary.reference.com/browse/about>)

The housing 12 surrounds the shell assembly 18 such that an enclosed spaced that joins an end of the vacuum conduit 58 to the vacuum tube 60 is *defined* such that pressure loss is prevented between the vacuum conduit 58 and the vacuum tube 60. The vacuum chamber (*cross-hatched; see illustration below*) includes a first aperture that receives the vacuum conduit 58 and a second aperture that receives the vacuum tube. Examiner has interpreted the housing 12 of Sauer to be the collective structure that encloses the respective elements as claimed, the vacuum chamber is a cavity specifically outlined by a portion of the housing. Thus, the housing and vacuum chamber of Sauer are distinct elements.



In response to Appellant's argument as presented in lines 4-12 on page 10 of the arguments filed on May 20, 2009, Examiner acknowledges that Sauer et al. labels the structure identified by Examiner with terminology that differs with that of Appellant's claimed invention; however, the structure of Appellant's invention as claimed is found to be anticipated by Sauer et al., nonetheless.

While Examiner appreciates the differences between Appellant's invention as disclosed and that of Sauer et al., Examiner has not found those structural differences to be sufficiently articulated in the pending rejected claims.

Examiner maintains the 35 U.S.C. 103(a) rejection of claim 7 as being unpatentable over Sauer et al., as the claimed limitations are found to be an obvious modification of the cited reference.

In response to Appellant's argument that the limitations of claim 7 are not met based on the deficiencies of independent claim 6 from which claim 7 depends, Examiner refers to the response(s) provided above.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

/Gloria R. Weeks/
Examiner, Art Unit 3721

Conferees:

/Rinaldi I Rada/
Supervisory Patent Examiner, Art Unit 3721

/Stephen Garbe/
TC 3700 RQAS